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SIPDIS

DEPARTMENT FOR L/UNA - MATHIAS, L/NEA - BOREK, SA

E.O. 12958: N/A

TAGS: [PREL](#) [IN](#) [PK](#) [ICJ](#)

SUBJECT: ICJ FINDS NO JURISDICTION OVER PAKISTAN-INDIA
AIRCRAFT SHOOTDOWN CASE

SUMMARY

1. IN A JUDGMENT ISSUED ON JUNE 21, THE INTERNATIONAL COURT OF JUSTICE (ICJ) DECIDED THAT THE COURT LACKED JURISDICTION OVER A CLAIM BROUGHT BY PAKISTAN AGAINST INDIA ARISING OUT OF THE ALLEGED DOWNING BY INDIAN FORCES OF A PAKISTANI AIRCRAFT TRAVELING IN PAKISTANI AIRSPACE. BY A VOTE OF 14 TO 2, THE ICJ DISMISSED PAKISTAN'S CLAIM. THE COURT NEVERTHELESS EXHORTED THE PARTIES TO RESOLVE THEIR DISPUTE BY PEACEFUL MEANS IN ACCORDANCE WITH INTERNATIONAL LAW.

BACKGROUND

2. ON JUNE 21, THE ICJ ISSUED ITS JUDGMENT ON THE PRELIMINARY OBJECTIONS LODGED BY INDIA IN A CASE BROUGHT BY PAKISTAN ON 21 SEPTEMBER 1999. IN ITS APPLICATION, PAKISTAN ALLEGED THAT AN UNARMED PAKISTANI NAVY AIRCRAFT, THE "ATLANTIQUE," WHILE ENGAGED IN A ROUTINE TRAINING MISSION IN PAKISTANI AIR SPACE, WAS SHOT DOWN BY INDIAN AIR FORCE PLANES. PAKISTAN ALSO ALLEGED THAT AFTER THE PLANE WAS SHOT DOWN, INDIAN HELICOPTERS ENTERED PAKISTANI TERRITORY TO COLLECT DEBRIS FROM THE WRECKAGE OF THE PLANE TO SUPPORT INDIA'S POSITION THAT THE PLANE HAD BEEN SHOT DOWN OVER INDIAN AIR SPACE. PAKISTAN ALLEGED THAT THE DOWNING OF THE "ATLANTIQUE" VIOLATED THE U.N. CHARTER'S PROHIBITION ON THE USE OF FORCE, A BILATERAL AGREEMENT ON THE PREVENTION OF AIR SPACE VIOLATIONS, AS WELL AS CUSTOMARY INTERNATIONAL LAW NORMS NOT TO USE FORCE AGAINST OTHER STATES AND NOT TO VIOLATE THE SOVEREIGNTY OF OTHER STATES.

3. ON 2 NOVEMBER 1999, INDIA FILED PRELIMINARY OBJECTIONS TO PAKISTAN'S APPLICATION, AND ARGUED IN PARTICULAR THAT THE ICJ LACKED JURISDICTION OVER PAKISTAN'S CLAIM. AFTER MEMORIALS WERE FILED ON THE JURISDICTIONAL ISSUE, THE COURT ON APRIL 3-6 HELD A HEARING.

JURISDICTIONAL GROUNDS

4. PAKISTAN SOUGHT TO BASE THE ICJ'S JURISDICTION ON THREE SEPARATE GROUNDS: (1) THE DISPUTE RESOLUTION PROVISION OF THE GENERAL ACT FOR PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES, SIGNED AT GENEVA ON 26 SEPTEMBER 1928 ("THE 1928 GENERAL ACT"); (2) THE "OPTIONAL CLAUSE" DECLARATIONS OF INDIA AND PAKISTAN UNDER ARTICLE 36(2) OF THE STATUTE OF THE ICJ; AND (3) ARTICLE 36(1) OF THE STATUTE OF THE ICJ.

THE 1928 GENERAL ACT

5. ARTICLE 17 OF THE 1928 GENERAL ACT, TO WHICH BRITISH INDIA ACCEDED IN 1931, PROVIDED FOR THE REFERRAL TO THE PERMANENT COURT OF INTERNATIONAL JUSTICE, THE ICJ'S PREDECESSOR, OF INTERNATIONAL DISPUTES BETWEEN PARTIES TO THE ACT. THE PARTIES ADVANCED A VARIETY OF ARGUMENTS ABOUT WHETHER THE 1928 GENERAL ACT REMAINS IN EFFECT, AND WHETHER IT CONSTITUTES A TREATY UPON WHICH THE ICJ'S JURISDICTION MAY BE BASED. THE ICJ DID NOT ADDRESS THESE GENERAL QUESTIONS, BUT RATHER NOTED THAT INDIA, IN A 1974 COMMUNICATION TO THE U.N. SECRETARY-GENERAL, ANNOUNCED THAT IT "NEVER REGARDED (ITSELF) AS BOUND BY THE (GENERAL ACT) SINCE HER INDEPENDENCE IN 1947, WHETHER BY SUCCESSION OR OTHERWISE. ACCORDINGLY, INDIA NEVER HAS BEEN AND IS NOT A PARTY TO THE GENERAL ACT EVER SINCE HER INDEPENDENCE."

6. THE ICJ RULED THAT EVEN IF INDIA COULD NOT CLAIM THAT IT

WAS NEVER SINCE INDEPENDENCE A PARTY TO THE 1928 GENERAL ACT, THE 1974 COMMUNICATION EFFECTIVELY CONSTITUTED A DENUNCIATION UNDER ARTICLE 45 OF THAT ACT. AS SUCH, THE LATEST INDIA COULD BE DEEMED TO BE A PARTY TO THE GENERAL ACT WAS AUGUST 1979, THE DATE ON WHICH SUCH A DENUNCIATION WOULD TAKE EFFECT. THE COURT ACCORDINGLY CONCLUDED THAT THE 1928 GENERAL ACT COULD NOT SERVE AS A BASIS FOR THE ICJ TO EXERCISE JURISDICTION OVER PAKISTAN'S CLAIM AGAINST INDIA.

ARTICLE 36(2) OPTIONAL CLAUSE DECLARATIONS

17. PAKISTAN ALSO SOUGHT TO BASE THE COURT'S JURISDICTION UNDER ARTICLE 36(2) OF THE ICJ STATUTE, THE SO-CALLED "OPTIONAL CLAUSE," UNDER WHICH STATES MAY FILE DECLARATIONS CONSENTING TO THE COURT'S JURISDICTION OVER DISPUTES WITH ANY OTHER COUNTRIES THAT HAVE SIMILARLY FILED OPTIONAL CLAUSE DECLARATIONS. INDIA OBJECTED, ON THE GROUNDS THAT IT MADE ITS OPTIONAL CLAUSE DECLARATION SUBJECT TO A NUMBER OF RESERVATIONS PRECLUDING JURISDICTION IN CERTAIN CASES, INCLUDING DISPUTES CONCERNING MULTILATERAL TREATIES (UNLESS ALL PARTIES TO THE TREATY ARE ALSO PARTY TO THE ICJ CASE) AS WELL AS DISPUTES WITH COUNTRIES WHICH ARE OR HAVE BEEN MEMBERS OF THE "COMMONWEALTH OF NATIONS."

18. THE ICJ DID NOT RULE ON THE MULTILATERAL TREATY RESERVATION, BUT HELD THAT PAKISTAN'S CLAIM WAS BARRED BY INDIA'S "COMMONWEALTH NATIONS" RESERVATION. THE COURT REJECTED PAKISTAN'S CLAIM THAT PAKISTAN'S NONACCEPTANCE OF THE RESERVATION MADE IT "INOPPOSABLE" TO PAKISTAN. IT ALSO REJECTED PAKISTAN'S SUGGESTION THAT THE "COMMONWEALTH NATIONS" RESERVATION WAS OBSOLETE BECAUSE MEMBERS OF THE COMMONWEALTH WERE NO LONGER UNITED BY A COMMON ALLEGIANCE TO THE CROWN. THE COURT REAFFIRMED THE RIGHT OF STATES TO CONDITION THEIR CONSENT TO THE ICJ'S JURISDICTION, AND CONCLUDED THAT ALTHOUGH THE HISTORICAL REASONS FOR INDIA'S "COMMONWEALTH NATIONS" RESERVATION MAY HAVE CHANGED, THIS DID NOT PREVAIL OVER THE INTENTION OF THE DECLARANT STATE AS EXPRESSED IN THE RESERVATION ITSELF.

ARTICLE 36(1) OF THE ICJ STATUTE

19. PAKISTAN ALSO ARGUED THAT THE ICJ HAD JURISDICTION OVER THE CASE UNDER ARTICLE 36(1) OF THE ICJ STATUTE, WHICH PROVIDES THAT THE JURISDICTION OF THE ICJ COMPRISES, AMONG OTHER THINGS, "ALL MATTERS SPECIALLY PROVIDED FOR IN THE CHARTER OF THE UNITED NATIONS." THE COURT REJECTED PAKISTAN'S CLAIM THAT ARTICLES 1(1), 2(3), 2(4), 33, 36(3), AND 92 OF THE U.N. CHARTER CONSTITUTED SPECIFIC PROVISIONS CONFERRING COMPULSORY JURISDICTION ON THE ICJ.

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OBLIGATION TO SETTLE DISPUTES BY PEACEFUL MEANS

110. ALTHOUGH THE ICJ FOUND THAT IT HAD NO JURISDICTION OVER THE APPLICATION BROUGHT BY PAKISTAN AGAINST INDIA, IT NOTED THAT THE COURT'S LACK OF JURISDICTION DOES NOT RELIEVE THE PARTIES OF EITHER THEIR OBLIGATIONS TO COMPLY WITH INTERNATIONAL LAW OR THEIR LEGAL OBLIGATION TO SETTLE THEIR DISPUTE BY PEACEFUL MEANS.

DISMISSAL BY 14 VOTES TO 2

111. THE COURT CONCLUDED BY A VOTE OF 14 TO 2 THAT IT HAD NO JURISDICTION OVER PAKISTAN'S APPLICATION AGAINST INDIA. ONLY JUDGE AL-KHASAWNEH, THE RECENTLY-ELECTED JORDANIAN JUDGE, AND JUDGE PIRZADA, THE AD HOC JUDGE APPOINTED FOR PURPOSES OF THIS CASE BY PAKISTAN, VOTED AGAINST THE DISMISSAL.

COMMENT

112. BECAUSE THE COURT'S DECISION IN THE PAKISTAN-INDIA CASES TURNS ON THE SPECIFIC LANGUAGE OF PARTICULAR DECLARATIONS LODGED BY INDIA, IT IS UNLIKELY TO HAVE BROAD LEGAL CONSEQUENCES BEARING ON OTHER DISPUTES. THE COURT DID RESIST

THE TEMPTATION, HOWEVER, TO TAKE AN EXPANSIVE VIEW OF ITS OWN JURISDICTION THAT WOULD UNDERMINE THE ABILITY OF STATES CAREFULLY TO LIMIT THEIR WILLINGNESS TO CONSENT TO THE COURT'S JURISDICTION.

¹13. THE TEXT OF THE ICJ'S JUDGMENT AND THE OPINIONS OF JUDGES WHO WROTE SEPARATELY OR DISSENTED, AS WELL AS A PRESS RELEASE AND LONGER SUMMARY OF THE JUDGMENT, MAY BE FOUND AT THE ICJ'S WEBSITE: WWW.ICJ-CIJ.ORG.
SCHNEIDER